



**RIGA  
GRADUATE  
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LAW**

# **Separate and Dissenting Opinions: Their Role in the Practice of the ICJ**

## **MASTER'S THESIS**

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**DECLARATION OF HONOUR:**

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) .....

RIGA, 2019

## **ABSTRACT**

The purpose of the thesis is to draw attention to the significance of the individual opinions in the practice of the International Court of Justice. The author aims to define the *actual* role of individual opinions in the system of work of the International Court of Justice by means of analyses of individual opinions appended to the Court's judgements, rendered under contentious and advisory jurisdiction of the Court. In this thesis possible solutions proposed of how the existence of individual opinions should be regulated in the basic documents of the International Court of Justice.

## SUMMARY

The purpose of the thesis “Separate and dissenting opinions: their role in the practice of the ICJ” is to address the problem of the actual place of the individual opinions in the system of work of the International Court of Justice and to propose possible solutions to the problem of how the existence of individual opinions should be regulated in the basic documents of the International Court of Justice.

The introduction of the thesis determines the aims of the present research and briefly defines the directions of the existing discussions in academic community and amongst the judges of the International Court of Justice about the place of the system of individual opinions in the practice of the Court.

The first chapter of the thesis provides for a general purpose and functions of the system of individual opinions in the light of the historical overview of how the right to deliver individual opinion was included in the Statute of the Court. The main terms, types of individual opinions and the problem of limitation of the scope of individual opinions are examined in the chapter.

The second chapter identifies the disputable aspects of the role of individual opinions in the practice of the Court. Two main arguments against the existence of individual opinions as a judge’s statutory right in the International Court of Justice are examined: the publication of individual opinions and the influence of individual opinions on the authority of the court. The purpose of this chapter is to identify possible practical correlation between the publication of individual opinions and possible diminishment of the authority of the Court.

The third chapter consists the analysis of the positive aspects of the existence of the system of individual opinions in the work of the Court. The function of the system of individual opinions to be a source for interpretation or elucidation of a judgement of the Court is evaluated in this chapter. The hypothesis is proposed and discussed that individual opinions are the part of a judgement of the Court. Also, the *actual* role of the individual opinions in the development of international law is analyzed in this chapter. The author proposes the hypothesis of the existence of a phenomenon of “jurisprudence of individual opinions” which functions separately from the jurisprudence of the Court.

The last part of the research formulates conclusions of the thesis and provides proposals for possible solutions to problems indicated in the research and recommendations for possible future research.

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# 1 INTRODUCTION

The question on individual pronouncements in the collective courts is difficult and much debated. The continental system of law and the anglo-saxon system of law have opposite approaches to the solution of the problem of dissent. The International Court of Justice, which is composed of judges from different legal system has created its unique practice in respect to individual opinions. Although the system of individual opinions has been implemented in the Statute of the International Court of Justice almost a century ago it still seems to be unsettled. The judges of the International Court of Justice have a statutory right to express their opinion in a form of dissenting or separate opinion if they do not agree with the majority decision. The judges of the Court make use of this right frequently. There is only one judgement in the practice of the International Court of Justice that has no individual opinions appended to it.<sup>1</sup> Even when the decision of the Court in a particular case is unanimous, there are judges who deliver their separate opinions.

However, the duration of the existence and the frequency of usage has not added much authority to individual opinions. The discussions on the utility of individual opinions and on the desirable prohibition of these opinions are still remained open in academic community. Moreover, there is a significant disagreement about the future destiny of individual opinions between the judges of the International Court of Justice.

The opponents of the system of individual opinions claim that this system has negative effect on the work of the Court in two main aspects. The first aspect is the secrecy of deliberations of the Court. The rule on the secrecy of deliberations is provided by the Statute of the Court and is one of the cornerstones of the authority of the Court and independence of judges. The second aspect is the authority of the Court in general, which is deemed to be compromised by the publication of separate and, especially, dissenting opinions. In the view of the opponents of the system of individual opinions the authority of the Court naturally rests on the anonymous unanimous decision.

The supporters of the system of individual opinions state that without this system it is hard to imagine a *progressive* development of international law, that individual opinions guarantee the independence and personal responsibility of a judge and increase the quality of the majority decision.

The existing studies of the individual opinions in the practice of the International Court of Justice tend to propose three types of solutions to the problem. The typical proposal is to abolish individual opinions in the practice of the International Court of Justice and to establish a rule of the anonymous unanimous decision. The second typical proposal is to prohibit the publication of individual opinions. And the third typical proposal is to maintain the *existing* system of individual opinions with increasing the level of transparency of the process of deliberations of the Court.

The aims of the thesis are to identify the *actual* role of the system of the individual opinions in the practice of the International Court of Justice and, consequently, to propose possible solutions of strengthening the positive effect that this system has on the work of the International Court of Justice.

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<sup>1</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Rep. 2009 (Feb.3), p. 61.

In order to reach the purpose of the research it is important to raise the questions:

1. What are the practical and theoretical reasons for the divergent attitude towards the system of the individual opinions amongst the scholars and the judges of the International Court of Justice?
2. Is there a correlation between the existence of the system of individual opinions and the diminishment of the Court's authority?
3. Do individual opinions in *practice* of the International Court of Justice contribute to the progressive development of international law?
4. What are the possible proposals on how to regulate the system of individual opinions in the basic documents of the International Court of Justice?

The present research is based on both, primary and secondary sources of law. The primary sources of law include international conventions, the Statute of the Permanent Court of International Justice and the Statute of the International Court of Justice. The secondary sources include judgements of the Permanent Court of International Justice and individual opinions appended to them, judgements, advisory opinions, orders of the International Court of Justice and individual opinions appended to these documents, academic literature, which include books and academic articles, and the official publications of the International Court of Justice.

## 2 THE CONCEPT OF INDIVIDUAL OPINIONS IN INTERNATIONAL LAW

### 2.1 General purpose and function of individual opinions

A decision-making process in the work of collegiate courts implies that judges who make up the court do not necessarily have to have the same opinion about the case which was referred to it. It is natural that important cases bring disagreements even amongst judges in final instance in national courts as well as in international adjudication. There is, however, an unanimously accepted conception that a judgement in a collegiate court is not merely the collection of individual opinions on the merits of the case in question made by the most respected jurists in the particular community but a collective decision of the court as an entity. This may lead to the conclusion that a collegiate court as a body should produce a single decision that represents the final judgement on the case giving no room for any doubts that there could be another opinion inside the court. Although it does not seem mutually exclusive that different opinions on the given case may exist in a collegiate court, and the court might still act as a collective, several questions remain. It is not clear whether these different opinions should take any legal form and whether they should be disclosed to the general public, or whether the secrecy of private deliberations of the court should be guaranteed.

It has taken many debates before the provisions on individual opinions were adopted in the basic documents of the Permanent Court of International Justice. Adoption of these provisions and consequent practice of the Permanent Court of International Justice and its successor - the International Court of Justice, raised questions on how judges are able to use above-mentioned provisions in compliance with the spirit and letter of the Statute of the Permanent Court of Justice and of the Statute of the International Court of Justice.

The tradition of judicial dissent belongs to common law system of courts. However, based on the documents on the preparation to the establishment of the Permanent Court of International Justice, the predecessor of the International Court of Justice, it is justified to assume that preconditions to guarantee a judge's statutory right to express an individual opinion in international adjudication can be traced back to international arbitration. 1899 Convention for the Pacific Settlement of International Disputes in Article 52<sup>2</sup> gave members of the Tribunal a truncated right to dissent without explanation of their reasons. 1907 Convention suppressed the right of expressing individual opinions simply stating in Article 79 "The Award must give the reasons on which it is based. It contains the names of the Arbitrators; it is signed by the President and Registrar or by the Secretary acting as Registrar."<sup>3</sup> The practice was, in other words, inconsistent.

The Council of the League of Nations appointed The Advisory Committee of Jurists to submit a draft of the Statute of the Permanent Court of International Justice. The analysis of acts and documents concerning the organization of the Permanent Court of International Justice shows that intense deliberations and debates took place amongst the members of The Advisory Committee of Jurists and then amongst the members of the Court while considering the

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<sup>2</sup> E. Dumbauld, "Dissenting Opinions in International Adjudication", *University of Pennsylvania Law Review and American Law Register* 90 (8) (1942): p. 941.

<sup>3</sup> R.P. Anand, "The Role of Individual and Dissenting Opinions in International Adjudication" *The International Comparative Law Quarterly* 14, no.3 (1965): p. 795.

questions whether individual judges should be allowed to express their views and to explain publicly why they voted against the opinion or judgement of the majority of the Court.

In the course of the preparation of the Rules of the Court in 1922<sup>4</sup> there were no significant debates on the provision of the Rules regarding delivery of a separate opinion, but a question was raised whether it was possible to file a dissenting opinion when the Court exercises its *advisory* jurisdiction. The argument against such a possibility was that the existence of dissenting opinions could undermine the Court's moral authority of advisory opinions as its advisory opinions have no binding effect. Also, it would make no sense to apply to the Court for an advisory opinion if the Court's official opinion might consist of several divergent opinions on the question. Nevertheless, the Rules of the Court adopted on March 24, 1922 in Article 62 and Article 71 permitted dissenting judges to append their opinions<sup>5</sup> both in cases of contentious and advisory jurisdiction. However, the revision of the Rules of the Court in 1926<sup>6</sup> reopened the well-argued discussions about the permitting dissenting opinions and in what form these should be made. The provisions on dissenting opinions were, however, included in the Statute of the Court at that time. President Loder expressed his negative attitude towards dissenting opinions in general. He referred to the fact that the Court was established under the continental conception implying that the Court should act as a collective. He also questioned the authority of the Court to include in the Rules of Court the provision on dissenting opinions under advisory jurisdiction.<sup>7</sup> M. Anzilotti stated that "the principle of dissenting opinions was a fundamental principle of the Statute."<sup>8</sup> M. Oda, on the one hand, explained his position against publication of dissenting opinions with the concern that such publication might lead to dependence of national judges on their government. On the other hand, he insisted that as the principle of dissenting opinions has been already established and implemented in the practice of the Permanent Court of International Justice it would be wrong to change the accepted order.<sup>9</sup> After long deliberations the Court decided to follow the previous practice by eight votes to three. Accordingly, the Statute of the Court and the revised Rules of the Court amended on July 31, 1926<sup>10</sup> gave judges the flexibility in the choice of form of dissent in contentious and advisory jurisdiction. Article 71 of the revised Rules stated that:

Dissenting judges may, if they so desire, attach to the opinion of the Court either an exposition of their individual opinion or the statement of their dissent.<sup>11</sup>

In the course of the debates which are mentioned above another important issue was discussed. The issue refers to functions of individual opinions. It was stated that the disclosure

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<sup>4</sup> International Court of Justice. *Rules of Court (adopted March 24, 1922)* Available on: [https://www.icj-cij.org/files/permanent-court-of-international-justice/serie\\_D/D\\_01.pdf](https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_01.pdf) accessed May 20, 2019.

<sup>5</sup> *Ibid.*

<sup>6</sup> International Court of Justice. *Statute and Rules of the Court, First Edition, Series D. №.1, 1926* Available on: [https://www.icj-cij.org/files/permanent-court-of-international-justice/serie\\_D/D\\_01\\_1e\\_edition.pdf](https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_01_1e_edition.pdf) Accessed May 20, 2019.

<sup>7</sup> International Court of Justice. *Acts and documents concerning the Organization of the Court. Series D Addendum to No.2, 1926*, p. 195 Available on: [https://www.icj-cij.org/files/permanent-court-of-international-justice/serie\\_D/D\\_02\\_acts\\_and\\_doc\\_serie\\_d\\_add\\_to\\_n2.pdf](https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_02_acts_and_doc_serie_d_add_to_n2.pdf) Accessed May 20, 2019.

<sup>8</sup> *Ibid.* p. 196.

<sup>9</sup> *Ibid.* p.197.

<sup>10</sup> *Supra* note 6.

<sup>11</sup> *Supra* note 6.



of dissenting opinions is directly linked to the Court's policy of openness and publicity. This policy both strengthens the authority of the Court and develops the principle of individual responsibility of judges<sup>12</sup>. Thus, it can be deducted that since the establishment of the Court the role of individual opinions was understood to be broader than simply to serve as an instrument for judges to defend their position on voting.

The question on dissenting opinions was raised again in the work of the Committee of Jurists on the Statute of the Permanent Court of International Justice in 1929. M. Formageot was strongly convinced that the practice of the Court to disclose the existence of different opinions on a pending case should be suppressed. He insisted that such a disclosure increased the influence of governments to the national judge, regardless of whether the disclosure was done only by indication of the fact that there was dissent in the case or by appending the statement of dissent to the judgment with an explanation of the reasons of the dissenting judge. The proposal was made to eliminate any form of the publicity of dissenting opinions and to render a judgment solely in the name of the Court.<sup>13</sup> It is interesting that the Committee had never discussed the possibility of *anonymous* individual opinions as a mean of suppression of influence of governments on the national judge. One of the concerns of the members of the Committee about the aforesaid proposal of M. Formageot was that countries from the Anglo-Saxon legal system might withdraw from the Court, because the existence and disclosure of individual opinions is one of the fundamental principles of legal tradition in those countries. However, the substantive reason for keeping the system of publicity of individual opinions was that:

The duty of the Court was not merely to settle disputes brought before it. It should establish a jurisprudence based only on the opinions of the judges.<sup>14</sup>

As a result of such reasoning and due to the fact that the majority of the Court defended the system of dissenting opinions, the provisions of the Statute and the Rules on dissenting opinions were saved.

Nevertheless, the very existence of the discussions on dissenting opinions which occurred almost in every elaboration of the Statute or the Rules shows that there are strong divergent opinions on how to keep the balance between the Court's principle of publicity and the desire to strengthen its authority as the main body of international adjudication. A fundamental principle has emerged out of the debates on dissenting opinions. It is that the *publicity* of the Court is a cornerstone of the *authority* of the Court. It is impossible to build a hierarchy between the principle of publicity and the authority of the Court for the reason that these concepts are inseparable. The correlation between two concepts is that publicity increases the authority.

Although, there is still no consensus amongst members of the scientific and professional legal community on the reasons for the emergence of individual opinions, their content and style, there is a general understanding that it is impossible to deny a certain influence of individual opinions both on the judgments of the Court and on the Court as a body.

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<sup>12</sup> *Supra* note 7, p. 200.

<sup>13</sup> International Court of Justice. *Committee of Jurists on the Statute of the Permanent Court of International Justice, Minutes, 1929*, p.50 Available on: [https://www.icj-cij.org/files/permanent-court-of-international-justice/serie\\_D/D\\_minutes\\_statut\\_PCIJ\\_11au19march\\_1929.pdf](https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_minutes_statut_PCIJ_11au19march_1929.pdf) Accessed May 20, 2019.

<sup>14</sup> *Supra* note 13, p. 51.

There is an opinion that “The negative side of a dissenting opinion is more prominent and the positive side less in evidence in international than in national jurisprudence.”<sup>15</sup> As was already mentioned, one of the arguments against individual opinions is the loss of the authority of the Court when the absence of a common position amongst judges becomes publicly acknowledged. There is a fear that a judgement made by a minimum majority accompanied by detailed, meaningful and well-reasoned individual opinions diminishes the authority of the Court as a body. The consequence of diminished authority might be the decrease of the confidence of states in the Court’s power to render binding decisions. Although judgments delivered by the Court are legally binding, the question is raised by the opponents of the system of dissenting opinions is whether a judgment made by a minimum majority still has a morally binding effect. The opponents of the system of dissenting opinions usually consider individual opinions as a criticism of the judgement, in their view the awareness of the public about the existence of a dissenter amongst the members of the Court “may weaken the authority of the majority pronouncements and detract from the dignity of the Court.”<sup>16</sup>

It is said that the purpose of the existence of any phenomenon can be determined through its functions. In order to determine the value of individual opinions and their role in the jurisprudence of the Court it is necessary to define the functions of individual opinions. For the first time particular functions of individual opinions have been defined in the course of the deliberations of Committee of Jurists on the Statute of the Permanent Court of International Justice in 1929. It was stated that publication of dissenting opinions would lead to a more thorough examination by the Court of all different arguments made by the dissenters. Also, the Committee noted that publication of dissenting opinions increases the quality of the judgement itself. It makes the Court to state the reasons in the judgment clearly. Furthermore, it was admitted that system of dissenting opinions significantly decreases possibility of any political considerations that might affect the judgement.<sup>17</sup>

Thus, it can be concluded that individual opinions have several important positive functions such as:

- improvement of style and arguments of the judgement of the Court;
- strengthen the authority of the Court as the party which lost the case may find arguments in its favor in individual opinions. This confirms that the arguments of the losing party were reviewed by the Court and were convincing at least for the minority;
- individual opinions can be considered as one of the safeguards of the principle of independence of judges;
- individual opinions can be a source for interpretation or elucidation of the judgement of the Court.

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<sup>15</sup> E. Hambro, “Dissenting and Individual Opinions in the International Court of Justice” *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 17 (1956-57): p. 230.

<sup>16</sup> *Ibid.*, p. 248.

<sup>17</sup> *Supra* note 13, p. 52.

Functions that are mentioned above allow individual opinions to be useful and frequently used instrument in international adjudication:

The pronouncement of individual judges in their separate and dissenting opinions, it is important to note, cover almost two and one-half times space (2, 126 pages) taken up by the majority opinions and judgements 9864 pages) in the official reports.<sup>18</sup>

The general purpose of individual opinions seems to be more important and underestimated at the same time. Regular dissents may indicate that international law in particular field doesn't work properly or is outdated. That could lead to the conclusion that "individual opinions may help to bridge the gap between the law of yesterday and tomorrow."<sup>19</sup> Publication of individual opinions "would, incidentally, help to build up rules of international law."<sup>20</sup> However, constant discussions about the possible prohibition of publication of individual opinions due to the reason that such publication erodes the authority of the Court distracts the professional and academic community from the detailed analyses of the role of individual opinions in the practice of the International Court of Justice.

## **2.2 Main terms, types of individual opinions of the International Court of Justice**

The right to dissent is frequently used by judges of the International Court of Justice. Separate opinions, dissenting opinions, declarations append not only to the Court's judgments but to the other procedural documents of the Court, for example, orders, fixing of the time-limit<sup>21</sup>. Despite the frequency of use there is no legal definition of separate or dissenting opinions in the basic documents of the International Court of Justice. Article 57 of the Statute provides:

If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.<sup>22</sup>

By literal interpretation of Article 57 of the Statute it is possible to draw a conclusion that the Statute permits individual opinions only in a form of separate opinion. However, Article 95 of the Rules of the Court (1978) states that:

Any judge may, if he so desires, attach his individual opinion to the judgement, whether he dissents from the majority or not; a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration. The same shall also apply to orders made by the Court<sup>23</sup>.

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<sup>18</sup> R.P. Anand, "The Role of Individual and Dissenting Opinions in International Adjudication" *The International Comparative Law Quarterly* 14, no.3 (1965): p. 789.

<sup>19</sup> Hambro, *supra* note 15, p. 248.

<sup>20</sup> *Supra* note 13, p.66.

<sup>21</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Order of 6 December 2016, I.C.J. Reports 2016, Separate opinion of Judge Cançado Trindade, p. 1137.

<sup>22</sup> International Court of Justice. *Statute of the International Court of Justice*. Available on: <https://www.icj-cij.org/en/statute> Accessed May 20, 2019.

<sup>23</sup> International Court of Justice. *Rules of Court (adopted March 24, 1922)* Available on: [https://www.icj-cij.org/files/permanent-court-of-international-justice/serie\\_D/D\\_01.pdf](https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_01.pdf) Accessed May 20, 2019.

Article 57 of the Statute of the Permanent Court of International Justice said without further detail that “dissenting judges are entitled to deliver a separate opinion.”<sup>24</sup>

Simple analysis of these provisions shows that basic documents of the International Court of Justice make no distinction between separate and dissenting opinions. Nevertheless, such a distinction appears in the Resolution concerning the Internal Judicial Practice of the Court, which in Article 7 provides that:

Judges who wish to deliver separate or dissenting opinions make the text thereof available to the Court after the first reading is concluded and within a time-limit fixed by the Court.<sup>25</sup>

Furthermore, a Yearbook of the Court which provides information about activities, organization, administration of the Court, in the chapter describing the judgment has a statement that:

Any judge is entitled to attach a separate or dissenting opinion, or a declaration which records his or her position without stating his or her reasons.<sup>26</sup>

Also, it might be justified to say that provisions of Article 57 the Statute of the International Court of Justice could be interpreted in the way that word “separate” is used as a general term for individual opinions and includes both concurring and dissenting opinions.

Such inconsistency between documents that regulate the work of the Court shows that the question of individual opinions still has not been resolved definitively. The Statute has established only one form of individual opinion which is the separate opinion. The Rules of the Court interpret the Statute very widely and add the form of individual opinion, which might represent the dissent, concurrence or semi concurrence in the form of a declaration. Apart from that, the Rules of the Court permit appending individual opinions to orders made by the Court. This diverges from the straightforward statement in the Statute that the system of individual opinions applies only to judgments of the Court. The Statute does not have the provisions on the possibility to append individual opinion to orders of the Court or other procedural documents.

Finally, the Resolution concerning the Internal Judicial Practice of the Court introduces the concept of dissenting opinion.

The reasons for the emergence of this inconsistency might be that the Court has created its own work practice with individual opinions. This practice is accepted and followed by judges of the Court for a long period of time. Judges of the International Court of Justice do not need a detailed explanation on how to distinguish a separate opinion from a dissenting opinion. The Court by its practice has developed and evolved the system of individual opinions and does not question the legitimacy of that system according to the letter of the Statute. The practice

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<sup>24</sup> International Court of Justice. *Statute and Rules of the Court, First Edition, Series D. №.1, 1926* Available on: [https://www.icj-cij.org/files/permanent-court-of-international-justice/serie\\_D/D\\_01\\_1e\\_edition.pdf](https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_01_1e_edition.pdf) Accessed May 20, 2019.

<sup>25</sup> International Court of Justice. *Resolution concerning the internal judicial practice of the Court, 1976* Available on: <https://www.icj-cij.org/en/other-texts/resolution-concerning-judicial-practice> Accessed May 20, 2019.

<sup>26</sup> International Court of Justice. *Yearbook of the Court 2016-2017*, p. 83 Available on: <https://www.icj-cij.org/files/publications/yearbook-2016-2017.pdf> Accessed May 20, 2019.

established by the Court gives reason to believe that the existence of individual opinions in different forms without any limitation of procedural documents to which individual opinions can be appended is consistent with the spirit of the Statute. However, such wide interpretation of the provisions of the Statute might need to be legitimized in order to strengthen the authority of the Court. The procedural aspects of the work of the Court should not be underestimated. It is a natural development of the law when the established practice is reflected in legislation. It seems desirable for the International Court of Justice as the principal judicial organ in international adjudication to secure the practice adopted by the Court by amending the Statute or the Rules of the Court with the provisions on individual opinions that reflect existing practice.

For the academic purposes a major distinction between separate and dissenting opinions is presented in this research. A separate opinion is an opinion where the judge who concurred with the majority and concurred with the conclusions of the judgement describes how he reached the same conclusion but upon a different basis of reasoning. The Committee of Jurists discussed the nature of separate opinions and distinguished separate opinions from dissenting opinions. The drafters of the Statute of the Permanent Court of International Justice noted that a certain part of dissent could be possible even when there is a concurrence in conclusions. The reason behind the acknowledgement of the necessity of separate opinions was to give to a judge the opportunity to explain his or her findings in a separate document even when concurring with a majority. Otherwise divergent reasonings may appear in the judgement that may lead to a weakness in the judgement, because such judgements “tended to take the form of a compromise”<sup>27</sup>. Also, the preconditions for the acknowledgement of the necessity of separate opinions can be found in the work of the Court. The practice to allow judges to express an opinion different from a dissenting one has already started to form. The Annual Report of the Permanent Court of International Justice states that “In the case of Advisory Opinion No. 7, Lord Finlay, while concurring in the opinion of the Court, was permitted to add observations in regard to the reasoning adopted by the Court.”<sup>28</sup> And that “In the case of Judgment No. 7, Lord Finlay who agreed with the conclusions of the judgment, but not with all the reasons given for one of these conclusions, was permitted to explain his views by means of observations which were attached to the printed text of the judgment and read by him in Court.”<sup>29</sup> The language of these statements indicates the permissive character of the opportunity that was used by Lord Finlay. In contrast, in the same section the possibility to attach dissenting opinion to the judgment is no longer under discussion, it is perceived as a right of a judge. The fact that it was “permitted” to Lord Finlay to express his concurring and yet different views leads to a conclusion that the Court felt the necessity to take a special decision about the future of separate concurring opinions.

A dissenting opinion is a non-concurring opinion in which the judge expresses his or her own views against the conclusion which had been reached by the Court. The existence of a dissenting opinion may possibly show that arguments of a government which lost a case were heard and that the government “had not been quite wrong in bringing the case before the

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<sup>27</sup> *Supra* note 13, p.65.

<sup>28</sup> International Court of Justice. *Annual report from 1925-1926*, p.173 Available on: [https://www.icj-cij.org/files/permanent-court-of-international-justice/serie\\_E/English/E\\_02\\_en.pdf](https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_E/English/E_02_en.pdf) Accessed May 20, 2019.

<sup>29</sup> *Ibid.*, p.173-174.

Court”<sup>30</sup>. The absence of such opinions may create a false impression that the judgment reflects the views of all judges and it is doubtful that the authority of the Court could be increased by hiding the truth.

### **2.3 The scope and legal nature of individual opinions of the International Court of Justice**

It might seem obvious and logical that the scope of individual opinions is limited by the reasons and matters that are presented in the majority opinion. However, the question remains whether judges are allowed to express their conclusions in dissenting or separate opinions on issues that are *not* included in the judgement but are important for the case from the point of view of these judges.

As it was already said there is no legal definition of individual opinions - both dissenting and separate - in the Statute of the Court and in the Rules of the Court. The absence of a definition which could determine the limits of individual opinions in relation to the scope of a judgement leaves the possibility for a wide interpretation of Article 57 of the Statute. The practice of the International Court of Justice shows that dissenting judges use conception similar to conception “competence competence” to determine the limit of freedom of expression, in a sense that they are presumed to be competent to decide the limits of the scope of their own individual opinions. Accordingly, without a general guideline from the Court on such an important topic, each judge shall decide for himself whether he or she crosses the line of relevance and admissibility of the views indicated in the individual opinion in question.

Thus, two divergent theories were developed inside the Court. The liberal theory states that rights granted to judges by Article 57 of the Statute of the Court are not subject to any limitation; therefore, dissenting judges have full freedom of expression and are not limited by matters decided in the judgement. Another theory has a restrictive character and its purpose is to restrain the scope of individual opinions and keep the views expressed in these opinions within the framework of the judgement of the Court. These two theories surfaced within the Court in connection with the judgement and individual opinions to the judgment in the South West Africa case<sup>31</sup>.

The restrictive theory was introduced by the President of the Court Sir Percy Spender. Sir Percy appended a declaration in which he asked himself a question whether “it is permissible or appropriate to express by way of separate opinion my views on these additional grounds for rejecting the Applicants' claims or certain of them.”<sup>32</sup> In the declaration Sir Percy makes an attempt to interpret the provisions of Article 57 of the Statute in the light of deliberations in the work of the Advisory Committee of Jurists and the Committee of Jurists which had been undertaken before the right to dissent was given to judges of the Court. He emphasises that historically the right to append an individual opinion in the form of a separate or

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<sup>30</sup> *Supra* note 13, p.52.

<sup>31</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, 2nd Phase, Judgment, I.C.J. Rep. 1966 (July 18), p. 6.

<sup>32</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, 2nd Phase, Judgment, I.C.J. Rep. 1966 (July 18), Declaration of President Sir Percy Spender p. 51.

dissenting opinion for judges of the Court gave rise to much debates and was granted as the result of a compromise. He also implies that drafters of the Statute of the Court did not intend to give judges the possibility to express their views on matters outside the scope of the judgement. Individual opinions are connected with the judgement, these opinions by their nature do not have an independent character, they are limited by the motivation in the judgement. Accordingly, Sir Percy formulates four major features of individual opinions. Individual opinions must have a direct connection with a judgement, individual opinions are secondary to the judgement which “must be the focal point of the different judicial views expressed on any occasion.”<sup>33</sup>, individual opinions should not deal with questions which are outside the scope of the Court’s judgement, and there should be an inevitable link between individual opinions and the judgement. The main argument of the restrictive theory is that the Court’s general function is to render a judgement or an advisory opinion. A judgment, obviously, is paramount compared to individual opinions. Needless to say, that without a judgement the purpose of existence of individual opinions is reduced to zero. Individual opinions as a part of the system of the work of the Court exist only when the Court renders a judgement.<sup>34</sup> Article 57 of the Statute of the Court grants the right to deliver a separate opinion “If the judgment does not represent in whole or in part the unanimous opinion of the judges.”<sup>35</sup> Thus, the right to deliver individual opinion is inseparable from the very existence of a judgement of the Court. This right is not an independent right. It is impossible to imagine the situation where an individual opinion could be delivered in the absence of a judgement. Apart from that, individual opinion should not replace the judgement. The judgement is rendered in the name of the Court but not under the name of individual judge. The purpose of individual opinions is not to decide the case but to lighten up gaps in international law and speed its development. In the dissenting opinion in the *Continental Shelf* case Judge Mosler underlined this idea:

Since it cannot be the legitimate purpose of a separate opinion of a judge being in the minority to offer an alternative decision, but rather to explain why he is not able to follow the reasoning and result of the Judgment, my remarks will concentrate only on the principal points of divergence of views.<sup>36</sup>

These statements bring up the conclusion that the freedom of expression of the judge in individual opinions might be restricted by the scope of the judgement. This issue becomes highly sensitive in the cases where the majority is small or where there is no majority at all. The best example is the *South West Africa* case<sup>37</sup> where votes were equally divided, and the President of the Court had to cast the decisive vote. It was noted before that even publication of the information on the results of voting creates concerns about how such publication might affect the authority of the Court. The reasoning in individual opinions which goes beyond the scope of the judgement could possibly make an impression of internal division in the Court. The authority of the Court could be shaken because individual opinions which focus on matters outside the framework of the judgement may represent not so much commentary on the judgment itself but criticism of the work of the Court in reaching a particular decision.

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<sup>33</sup> *Ibid.*, p.55.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Supra* note 22.

<sup>36</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Rep. 1985 (June 3), Dissenting opinion of Judge Mosler, p. 114.

<sup>37</sup> *Supra* note 31.

The criticism on the work of the Court shaped in the form of a judicial opinion could objectively be damaging to the authority and the reputation of the Court.

The liberal theory was represented by Judge Tanaka in his dissenting opinion to the judgment in the *South West Africa* case.<sup>38</sup> He stated that “The opinion of the majority is nothing but the common denominator among the opinions of judges who constitute the majority, but do not necessarily agree on the reasoning.”<sup>39</sup> According to conclusions of Judge Tanaka, individual opinions are fully separated and independent from the majority decision. In his view this approach is especially important when it is applied to dissenting opinions that by their nature can significantly differ in reasoning from the judgement. In fact:

Disagreement between the dissenting view and the majority view is not limited to the matter of legal right or interest but it is concerned with the whole attitude vis-à-vis all questions on the merits. The dissenting judges are able to argue on the hypothesis that their contention regarding the existence of the Applicants' legal right or interest is well founded.<sup>40</sup>

Judge Tanaka applied this theory also in his separate opinion to the judgement in the *Barcelona Traction* case.<sup>41</sup> Judge Tanaka pointed out that his separate opinion is not limited by the framework of the majority opinion, he emphasized “I feel that I must follow a logical process of my own which, according to my conscience, I believe to be just.”<sup>42</sup> Judge Jessup in his separate opinion to the judgement in the *Barcelona Traction* case<sup>43</sup> also interpreted Article 57 of the Statute of the Court according to the liberal theory of the scope of individual opinions. He stated, “I regret that the Court has not considered it appropriate to include in its Judgment a wider range of legal considerations.”<sup>44</sup> Judge Cançado Trindade in *Jurisdictional Immunities of the State* case went further in his dissenting opinion by stating:

My dissenting position is grounded not only on the assessment of the arguments produced before the Court by the contending Parties (Germany and Italy) and the intervening State (Greece), but above all on issues of principle and on fundamental values, to which I attach even greater importance.<sup>45</sup>

The absence of the limits of the scope of individual opinions does not automatically mean that these opinions do not have any scope at all. According to the statements of the proponents of the liberal theory the case itself forms the framework of the individual opinions. There is undeniable positive effect of the liberal theory. The existence of individual opinions which have the substance that is not limited by the framework of the majority decision could guarantee the higher quality of the judgement of the Court. The drafts of individual opinions are available to the majority and their preliminary content is not a secret to the Court in

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<sup>38</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, 2nd Phase, Judgment, I.C.J. Rep. 1966 (July 18) Dissenting opinion of Judge Tanaka, p. 262-263.

<sup>39</sup> *Ibid*, p.262.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Judgment, I.C.J. Rep. 1970 (Feb. 5), Separate opinion of Judge Tanaka, p. 114.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Judgment, I.C.J. Rep. 1970 (Feb. 5), Separate opinion of Judge Jessup, p. 161.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, Dissenting opinion of Judge Cançado Trindade, p.287.



accordance with Article 7 of the Resolution concerning the Internal Judicial Practice of the Court.<sup>46</sup> Consequently, it could persuade the Court to check every aspect of the case more carefully and might influence the process of deliberations.

The practice of the International Court of Justice after the South West Africa case shows that there are no longer significant debates in the Court anymore about these two theories. However, it is possible to trace the position of a particular judge regarding the scope of the individual opinion in his or her individual opinions. Some judges write their individual opinions in a restrictive way with respect to the majority decision. Others do not limit their dissent with the framework of the judgement of the Court. Thus, until the definition of individual opinion is included in the basic documents of the Court tension within the Court may emerge for the reason to limit the scope of individual opinions. Such a situation could threaten the authority of the Court more than could the judges who simply exercise their freedom of expression.

Another important aspect which needs to be determined is whether it is a right or an obligation to append individual opinion to the judgement. Although, this problem had been already solved in the basic documents of the International Court of Justice, it is worth to pay attention that Committee of Jurists discussed the nature of individual opinions in great details in 1926. There was an opinion amongst the members of Committee of Jurists that it is a duty to append the statement of dissent. This opinion was formed under the influence of practice when a judge who voted against the majority decision did not want to make reasons for his voting public. Also, there were occasions when a dissenting judge, on the one hand, did not want to make his dissent public by appending reasoned dissent to a judgement but, on the other hand, attached it to the minutes of private deliberations of the Court. The practice to append the statement of dissent to the minutes of the Court was abolished. The idea behind consideration whether it is a right or an obligation to append individual opinion was that dissent must always be reasoned. The question was raised whether the fact of dissent should be recorded when the dissent is not reasoned. The main argument against the proposal that the dissent should be recorded only when it is reasoned was that this new order could create a false impression on how the judgement was rendered. For example, if only one judge decides to record reasons for his dissent in a form of dissenting opinion, the public might think that only one judge voted against the majority decision. It was also discussed whether “a vote against the opinion of the majority was in itself a dissenting vote.”<sup>47</sup> The distinction was made, and the conception of dissenting vote was defined, as meaning a reasoned negative vote. At the same time, it was decided that in order to keep the secrecy of deliberations of the Court the names of judges who dissented should not be published unless the dissenting judge requests such publication. The judgment should state the results of voting only in numbers. By means of interpretation of Article 57 of the Statute of the Permanent Court of International Justice it was decided that provisions of the Statute do not impose an obligation on judges to append the statement of dissent.<sup>48</sup> The fact of the dissent should be recorded under the request of a judge even when the judge does not provide any public reasons for his opinion.

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<sup>46</sup> International Court of Justice. *Resolution concerning the internal judicial practice of the Court, 1976* Available on: <https://www.icj-cij.org/en/other-texts/resolution-concerning-judicial-practice> Accessed May 20, 2019.

<sup>47</sup> *Supra* note 7, p.220.

<sup>48</sup> *Ibid.*, p. 208-223.

“The judges had been given the right to dissent, but no duty had been imposed upon them.”<sup>49</sup> Article 95 of the Rules of the International Court of Justice (1978) gives straight answer to the question above. It provides that “Any judge may, if he so desires, attach his individual opinion to the judgement, whether he dissents from the majority or not.”<sup>50</sup> Furthermore, the same article states that “a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration.”<sup>51</sup> The practice of the International Court of Justice is in harmony with the decisions made by Committee of Jurists. The Court makes a distinction between “negative” vote and “dissenting” vote. The absence of dissenting opinions to the judgement does not automatically mean that the voting was unanimous.<sup>52</sup> It is no longer under the question that Article 57 of the Statute conferred the right to the judges but did not set the obligation. The examples confirming this conclusion can be found in the practice of the International Court of Justice.<sup>53</sup>

The acknowledgement that the negative vote and the dissenting vote are not always concurring made by the members of Committee of Jurists and the subsequent practice of the International Court of Justice could serve as one of the characteristics that distinguish dissenting opinion from separate opinion. A dissenting opinion is always a negative but negative vote is not always dissenting. Nevertheless, this obvious statement is controversial to the provisions of Article 57 of the Statute of the International Court of Justice. In this Article the Statute states that when the judgement does not represent the opinion of the judge in whole, the judge has a right to “deliver a separate opinion.”<sup>54</sup> Consequently, it would not be a mistake and would be in accordance with the Statute of the Court for a judge to present reasons for his or her negative vote in a separate opinion. Article 95 of the Rules of the Court does not elucidate this hypothetical situation because it states that “Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not.”<sup>55</sup> One could say that the term “separate opinion” in Article 57 of the Statute is used as a general term to all individual opinions, however, provisions of the Internal Judicial Practice of the Court in Article 7 state the opposite and distinguish separate opinion from dissenting<sup>56</sup>. On the one hand, this hypothetical situation seems to be not probable, due to the high qualification of judges, but on the other hand, inconsistency between the definitions of the types of individual opinions in the basic documents of the Court could possibly mislead the Court and the public.

In conclusion, it should be noted that the system of individual opinions in the Court of International Justice is still developing, although it seems that the Court tries to dismiss this fact. The decision to implement this system in work of the principal judicial body in

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<sup>49</sup> Hambro, *supra* note 15, p. 236.

<sup>50</sup> *Supra* note 23.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213.

<sup>53</sup> *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Judgment, I.C.J. Rep. 1970 (Feb. 5), Dissenting opinion of Judge Riphagen, p. 334.

<sup>54</sup> *Supra* note 22.

<sup>55</sup> *Supra* note 23.

<sup>56</sup> International Court of Justice. *Resolution concerning the internal judicial practice of the Court, 1976* Available on: <https://www.icj-cij.org/en/other-texts/resolution-concerning-judicial-practice> Accessed May 20, 2019.

international adjudication was made as a result of compromise. There was no strong conviction amongst the drafters of the basic document of the Court whether the decision to accept the system of individual opinions was the right one. The right to append an individual opinion to the judgment was granted in a truncated form without a clear definition of its scope. Yet, individual opinions have become an inalienable part of the work of the Court. However, the impression lingers that while being fully accepted by individual judges who wish to exercise their right, the individual opinion as a concept is not embraced by the Court as a body. The fact that the Statute of the Court makes no distinction between separate and dissenting opinion only proves this assumption. The system of individual opinions functions upon the established practice of the Court and not upon specific provisions. This does not strengthen the standing of individual opinions in the work of the Court, but then neither does it strengthens the authority of the Court itself.

### **3 DISPUTABLE ASPECTS OF THE ROLE OF INDIVIDUAL OPINIONS AT THE INTERNATIONAL COURT OF JUSTICE**

#### **3.1 Publication of opinions**

The system of publication of individual opinions which has been adopted in the work of the International Court of Justice is used as an argument in support of individual opinions as well as an argument against them.

Since the establishment of the Permanent Court of International Justice, the predecessor of the International Court of Justice, the question of whether individual opinions should be made available to the general public has been almost as significantly debated as the question of individual opinions itself. Although the provisions on the publication of individual opinions were included in the Statute of the Permanent Court of International Justice, the Committee of Jurists discussed the possibility of prohibiting publication in view of proposals of some members of the Committee in 1926 and in 1929, respectively. Both discussions lead to the conclusion which the Statute of the Permanent Court of International Justice has described as part of a policy of openness: any steps towards secrecy would not be in consistent with the provisions of the Statute. The International Court of Justice has followed this practice. The provisions of the Statute of the International Court of Justice that regulate disclosure of individual opinions have not been changed substantively in comparison with the similar provisions of the Statute of the Permanent Court of International Justice. The policy of transparency which has been adopted by the Permanent Court of International Justice has been strengthened by the practice of the International Court of Justice. However, the criticism of the system of publication of individual opinions has never really ceased.

The key arguments against the publication of the individual opinions emerged from the continental doctrine of law that has the principle of a strict secrecy of deliberations and voting and, consequently, does not permit individual opinions at all. According to the continental doctrine of law a decision of a court should be anonymous and unanimous, it should represent the fulfillment of the judicial function by the court as a collective body. The opponents of the principle of publicity in the Statute of the Permanent Court of International Justice and the Statute of the International Court of Justice usually claim that there are four main reasons that justify the prohibition of the publication of individual opinions. The first reason is that the publication of individual opinions possibly affects the rule of secrecy of deliberations of the Court. The second reason is that it is a threat to the independence of a judge. A third reason is that publication of individual opinions, and especially dissenting opinions, decreases the authority of the Court. The fourth and final reason is that disclosure of information that the Court's decision was not unanimous decreases the authority of the judgement in question.

The supporters of publication of individual opinions argue that the principle of publicity does not reduce the authority of the Court but, on the contrary, increases it. Also, arguments in support of publication of individual opinions are that such publication serves as a guarantee for the quality of the Court's judgement. It is one of the guarantees of the independence of a judge and it is one of the components of the principle of the personal responsibility of judges.

All arguments mentioned above were discussed in the work of Committee of Jurists in 1926. Nevertheless, the issue of the secrecy of deliberations was debated more than any other issue. The members of the Committee had different points of view regarding the hierarchy of principles in the Statute of the Permanent Court of International Justice. There was no

unanimous opinion in the Committee about the question which principle should prevail: the principle of the secrecy of deliberations or the principle of publicity. On the one hand, deliberations of the Court must be private and should remain secret. President Loder, a clear proponent of this principle, made a remark that provisions of the Statute on the secrecy of deliberations establish a general rule and that provisions of the Statute allowing to append dissenting opinions to the judgement of the Court are and should remain an exception to that rule. There was however also a point of view that “the fundamental principle of the Statute was that of publicity”<sup>57</sup> and that the rule of secrecy was just an exception to that principle. In order to reach a solution, the Committee has distinguished the actual secrecy of deliberations from the publicity of the voting results. It was eventually decided that disclosure of voting results with or without publication of individual opinions could not affect the secrecy of deliberations. This conclusion was made with the consideration that the Statute obliges the judgement of the Court to be published, and the Court therefor must state the reasons on which the judgment of the Court is based. It was also decided that voting results will be published only in numbers without the indication of names of the judges<sup>58</sup> concerned. This approach of the Committee once again has represented a compromise between the representatives of the civil law school and the representatives of the common law tradition. Also, the Committee had a purpose to ensure the secrecy of deliberations in order to prevent any possible manipulations by the states in relation to the “national” judges. The rule was followed by the International Court of Justice until 1978 when the Rules of the Court were amended. Article 95 of the Rules of the Court provided that the judgement shall contain “the number and names of the judges constituting the majority.”<sup>59</sup> However, texts of the Court’s judgements also contain the names of judges in the minority.<sup>60</sup> This amendment to the Rules of the Court has reopened the discussion about the risks of the publication of individual opinions. The supporters of the system of publication of individual opinions point out that the decision of the Court to publish the names of judges who constitute the majority proves that anonymity is not an unconditional prerequisite for impartiality and that such a decision is just a natural development in the direction of openness that has been defined since the work of the Permanent Court of International Justice.<sup>61</sup> On the other hand, these changes in the provisions of the Rules of the Court have been criticized for the reasons that publication of judges’ votes “makes a mockery out of the secrecy of the deliberations”<sup>62</sup> and that votes that have not been disclosed are “protected by the anonymity of a “unanimous” court.”<sup>63</sup> Furthermore, the former President of the International Court of Justice, Gilbert Guillaume stated that:

The independence of a court is a function not only of the procedures for judicial appointments and of the status of judges, but also of the manner in which the court in

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<sup>57</sup> *Supra* note 7, p. 200.

<sup>58</sup> *Ibid.*, p.220-221.

<sup>59</sup> *Supra* note 23.

<sup>60</sup> G. Guillaume, “Some Thoughts on the Independence of International Judges Vis-a-Vis States” *The Law and Practice of International Courts and Tribunals* 2 (2003): p. 166.

<sup>61</sup> F. Jhabvala “Individual Opinions under the New Rules of Court” *The American journal of International Law* 73 (1979): p.662.

<sup>62</sup> Forest L. Griebes “Reform of the Method of Rendering Decisions in the International Court of Justice” *The American journal of International Law* 64 (1970): p.148.

<sup>63</sup> *Ibid.*

question is organized and functions. In this respect, it should be pointed out that the secrecy of deliberations is a crucial guarantee of a judge's independence.<sup>64</sup>

Despite the argument that the system of publication of individual opinions negatively affects the secrecy of deliberations, it is undeniable that still the actual process of the Court's deliberations has remained secret.<sup>65</sup> The secrecy of deliberations, provided by the Statute of the Court is protected by the judges of the Court. The secrecy remains not only in connection with external relations but even within the internal procedure of the Court itself. "After the preliminary deliberation, each judge prepares a written note which is distributed, initially anonymously, to his colleagues."<sup>66</sup> The majority decision is drafted by the drafting committee. The election of the members of drafting committee is "a truly "secret" process - judges indicated that they did not discuss their votes with colleagues"<sup>67</sup>. Moreover, the reason for the reform of the Rules of the Court permitting the publication of the names of the judges in the majority, was, *inter alia*, that the prohibition of the disclosure of the votes of judges "stimulated some of their colleagues to make their thoughts on a case public via the separate opinion route."<sup>68</sup>

During the work of the International Court of Justice only once the secrecy of actual deliberations has been seriously violated. Before the Court's Order of 22 June 1973 indicating provisional measures in the *Nuclear Tests* case had been read in public, the press published the probable decision of the Court with the indication of precise voting results upon this decision, the Prime Minister of Australia stated that the Court reached the decision in favor of Australia by eight votes to six.<sup>69</sup> The Court had started an internal investigation immediately. The investigation had not revealed the source of the publication and had been terminated. The fact of termination of the investigation has been criticized by the separate opinion of Judge Gros.<sup>70</sup> The President of the Court appended the declaration to the judgement, which stated that:

Good administration of justice and respect for the Court require that the outcome of its deliberations be kept in strict secrecy and nothing of its decision be published until it is officially rendered.<sup>71</sup>

This incident showed that the Court also distinguishes the secrecy of actual deliberations and the publicity of voting results. When the publication of voting results has been made after the actual deliberations have been finished and the decision has been rendered it does not influence on the secrecy of deliberations anymore.

Based on the facts and not only on theoretical assumptions, no causal relationship was indicated between the permission of publication of individual opinions and possible disclosure of the actual process of the Court's deliberations. Amongst scholars there is a

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<sup>64</sup> *Ibid.*, p.165.

<sup>65</sup> I. Gleider Hernandez. *The International Court of Justice and the Judicial Function*. (Oxford university press, 2014) p.103.

<sup>66</sup> Richard B. Lillich and G. Edward White "The Deliberative Process of the International Court of Justice: A Preliminary Critique and Some Possible Reforms" *The American journal of International Law* 70 (1976): p.32.

<sup>67</sup> *Ibid.*, p.36.

<sup>68</sup> *Ibid.*, p.37.

<sup>69</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, Separate opinion of Judge Gros, p. 276.

<sup>70</sup> *Ibid.*, p.293-296.

<sup>71</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, Declaration of President Lachs, p. 273.

universal opinion that the actual process of deliberations is “something of a mystery”<sup>72</sup> and it seems that judges of the Permanent Court of International Justice and of the International Court of Justice have successfully maintained this “mystery” before and after the reform of the Rules of the Court mentioned above.

Some judges of the Court even express the opinion that still the level of transparency of deliberations should be increased even further. The Court’s Order of 07 December 2016 has indicated provisional measures in the *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* case. The voting was unanimous. However, Judge Gaja in his declaration claimed that decisions of the Court on the minor requests of the parties had not been recorded in the operative part of the Order. Also, Judge Gaja stated that there was no reference made in the Order to individual opinions of judges, which had expressed regarding such requests of the parties.<sup>73</sup> This shows that some results of deliberations are not available to the general public. Moreover, it might show that not all individual opinions have been made public. Furthermore, it again raises the question about the scope of individual opinions. Obviously, that limiting the scope of individual opinions with that of the judgement would lead to the situations where only the majority would decide which requests of the parties are minor. As these requests were not discussed in the decision it would be impossible for the individual judges to comment on such requests in their individual opinions. This could lead to the possibility of the majority of the Court controlling the freedom of expression of the minority of the Court. On the other hand, Judge Gaja stated that “It may be excessive to suggest that all the decisions concerning even minor requests of provisional measures should be recorded in the *dispositif*”<sup>74</sup> but further he claimed that it would be justified for the Court to indicate decisions even on minor requests and to state the names of the judges in the majority and in the minority on that issue.

Also, it is important to note that even opponents of publication of individual opinions due to the principle of secrecy of deliberations cannot deny the positive function of the Court’s transparency in this matter:

This regime does in any case have an advantage. It makes it possible for researchers to study voting patterns of the judges in an attempt to determine to what degree they rule independently of the point of view of the governments of their own countries.<sup>75</sup>

This statement correlates with the second controversial aspect of publication of individual opinions. The problem addressed here is that publication of individual opinions could possibly affect the principle of independence and impartiality of a judge. The supporters of the publication of individual opinions claim that it could serve as an extra guarantee for the independence of a judge because it reduces the possibility of political interference. The right of judges to express their views on the matters of the case by publication of individual opinions and the system of publication of names of the judges constituting the majority obviously makes it more difficult to have an influence on a judge from *outside*.

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<sup>72</sup> Richard B. Lillich and G. Edward White “The Deliberative Process of the International Court of Justice: A Preliminary Critique and Some Possible Reforms” *The American journal of International Law* 70 (1976): p.28.

<sup>73</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment, I.C.J. Reports 2018, Declaration of Judge Gaja.

<sup>74</sup> *Ibid.*

<sup>75</sup> Guillaume, *supra* note 60, p.166.

However, the main criticism of the publication of individual opinions derives from the “national” voting and the voting of *ad hoc* judges. It is important to note that this criticism is usually addressed not only to the publication of individual opinions but also to the principle of the publicity and transparency of the Court in general. There is a point of view that the judgment of the Court must be anonymous, otherwise “judges would be tempted to “please” the countries (or legal systems) from which they came”<sup>76</sup> and that “the publicity tends to accentuate rather than muffle nationality”<sup>77</sup>, consequently, “the myth of the Court's impartiality is seriously and unnecessarily hampered because the stands of individual judges become known.”<sup>78</sup> Indeed, this concern has been seriously discussed by the scholars since the work of the Committee of Jurists on the Statute of the Permanent Court of International Justice in 1929.<sup>79</sup> However, studies made in the different periods of time the aim of which was to analyze the voting behavior of national judges and judges *ad hoc* came to the conclusion that no significant correlation can be established between the publication of individual opinions and voting results. The reason why such correlation had never been statistically proven is that the correlation between the nationality of a judge and the results of his voting had never been established at the first place. In other words, national judges do not vote in favor of their own government as frequently as it might seem.<sup>80</sup> Also, it was concluded that sometimes the nationality of judges does, to some extent, determine their voting but the reason for this is the “attachment to the cultural values particular to their home country”<sup>81</sup> and not the political considerations. The situation with the voting of *ad hoc* judges is different and the studies show that they usually vote in favor of the State which appointed them.<sup>82</sup> Nevertheless, the mere possibility of existence of such studies is due to the principle of the publicity and transparency of the Court. If the publication of individual opinions was prohibited and unanimity of the judgement of the Court presumed, there would be no reliable data on voting behavior of “national” judges and *ad hoc* judges. The accurate and relevant data on voting behavior give a wide range for future analyses of the work of the Court which could lead to positive changes in particular systems of the Court, for example, in the frequently criticized system of judges *ad hoc*. Also, such studies prove that judges in international adjudication are truly independent and impartial and are not influenced by their national government. Even the opponents of the publication of individual opinions acknowledge that according to the conclusions of the studies “independence is above all a question of character. The only judges put under pressure are those thought likely to cede to it. A judge who wants to be independent is.”<sup>83</sup> These conclusions undoubtedly increase the authority of the Court and might end the discussion on whether the publication of individual opinions reduces the prestige of the Court.

Furthermore, it could be presumed that the system of publication of individual opinions has influenced on voting behavior of “national” judges and *ad hoc* judges in a positive way. Although there is no obligation for judges to append a reasoned dissenting opinion and dissent can be expressed in the form of declaration, disclosure of voting results make it

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<sup>76</sup> Grievies, *supra* note, 62 p.148.

<sup>77</sup> *Ibid.*, p.149.

<sup>78</sup> *Ibid.* p.145.

<sup>79</sup> *Supra* note 13, p.50.

<sup>80</sup> Guillaume, *supra* note 60, p.167.

<sup>81</sup> *Ibid.*, p.167-168.

<sup>82</sup> *Ibid.*, p.168.

<sup>83</sup> Guillaume, *supra* note 60, p.168.



impossible for a “national” judge and a judge *ad hoc* to vote consistently and without proper reasoning in favor of their own government or the government which has appointed them. It would be obvious for observers of the work of the Court that there might be a political motivation behind the vote of a particular judge if the judge constantly votes in favor of his government and does not give any explanation of the voting by means of separate or dissenting opinions. Consequently, the conclusion could be made that judges understand that the existing system of transparency makes a systematic politically motivating voting without further concerns in independence and impartiality of a particular judge almost impossible. Thus, the system of publication of individual opinions has the function of an additional guarantee against votes based on political considerations.

The third argument against publication of individual opinions is that such publication influences the authority of the Court. This argument is used more frequently than other arguments and has to be examined separately in the next subchapter.

The fourth argument emerges out of the previous one and states that the publication of individual opinions decreases the authority of the Court’s judgement in a case. Article 59 of the Statute of the International Court of Justice provides that the judgement of the Court has a binding effect only upon the parties and in respect to the given case.<sup>84</sup> Article 60 of the Statute states that the decision of the Court is final and cannot be the subject of appeal<sup>85</sup>. The normal procedure of execution of decisions of the International Court of Justice is based on the contentious jurisdiction of the Court. Undeniably, one of the conditions for the voluntarily compliance of the parties in the case with the Court’s decision is the high level of the authority of a judgement.

As was previously mentioned the scope of an individual opinion is not legally defined or limited by the matters that have been discussed in the Court’s judgement. Therefore, matters and reasons presented in an individual opinion might make an impression that the Court in its decision avoided certain aspects of the case. Also, dissenting opinions may point out some probable flaws in the majority decision. Moreover, the information that the judgement of the Court is actually a majority decision with a strong opposition represented by individual opinions may have a negative psychological effect on the general public. It is worth noting that “Also the tone of dissent the dissent has tended to be bitter and full of criticism instead of objective and judicial.”<sup>86</sup> The individual judges do not limit themselves with the style of the Court’s judgement and frequently use literary writing style in their individual opinions<sup>87</sup>. Consequently, some individual opinions are very expressive and easier to read than the Court’s decision which is limited by its own formal nature. This may lead to a situation where the arguments in individual opinions might sound more persuasive than the arguments in the majority decision just because the form of expression in individual opinions is not restricted. All reasons mentioned above could, possibly, decrease the authority of the particular judgement of the Court. Nevertheless, individual opinions contribute to the quality of a judgement. The existence of individual opinions forces the drafting committee to check the majority decision with more scrutiny. Drafts of individual opinions are accessible to all members of the Court. That gives members of the Court an opportunity to examine the

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<sup>84</sup> *Supra* note 22.

<sup>85</sup> *Ibid.*

<sup>86</sup> Hambro, *supra* note 15, p.243.

<sup>87</sup> *Ibid.*

arguments in individual opinions and possibly adjust the decision of the majority in light thereof.

Another reason should be mentioned in support of publication of individual opinions. One of the purposes of the existence of the Court is to build an international jurisprudence. When the decision is rendered unanimously it could mean that the provisions of international law which were indicated in the decision function properly and there is no gap between the law and the reality. In the contrary, when the Court is fundamentally divided, and the judgement of the Court is a decision of the minimal majority or even the result of the casting vote of the President it might indicate that a change of jurisprudence have to be made.<sup>88</sup> The fiction of unanimity could slow down or even stop the development of international law. Moreover, secrecy of individual opinions could be an obstacle for the Court to make use of the arguments from individual opinions in the case with similar circumstances.

In academic literature one can find an indication of a problem that publication of individual opinions jeopardizes the secrecy of deliberations. As a solution for this particular problem the author proposes a reform for the International Court of Justice. The proposal includes certain changes in the system of disclosure of voting results and the system of the publication of individual opinions. The author proposes to abolish the system of disclosure of voting results and to adopt the system of anonymous individual opinions.<sup>89</sup> In his opinion:

Dissenting opinions would be permitted, but authors would remain unidentified. This reform represents an excellent compromise because both the dissent and the secrecy are preserved.<sup>90</sup>

This proposal seems to be justified for several reasons. The first reason is that the system of anonymity of individual opinions could stop the debates about how publication of individual opinions influences the Court's authority. The argument that the decision of the Court should be rendered *only* in the name of the Court might be not relevant anymore. Anonymous opinions would be not as "individual" as they are now. The anonymity might deprive judges of opportunity to indicate such personal characteristics in the individual opinions as their background, personal attitude towards certain events<sup>91</sup> or even their own conscience. This might make the articulation of these individual opinions less expressive. Also, this might significantly reduce the quantity of individual opinions. It has been pointed out that "judges, both national and non-national, have appeared increasingly to seek the limelight of international attention."<sup>92</sup> The system of anonymous individual opinions might lead to abolishment of that inclination.

However, the analysis of this proposal also reveals its negative sides. Anonymity of individual opinions might turn the system of individual opinions into a system which simply doubles the functions of the Court. Anonymous individual opinions could create the impression of the multiple judgements on the particular case. Moreover, it is not clear how the proposed system would work. Does the proposal entail that individual opinions should be

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<sup>88</sup> *Supra* note 7, p.202.

<sup>89</sup> Grievés, *supra* note 62, p.148.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1. C.J. Reports 1996, p. 226, Separate opinion of Judge Oda.

<sup>92</sup> Jhabvala, *supra* note 61, p.664.

anonymous for the members of the Court as well? This might create an atmosphere of secrecy and mistrust inside the Court. Apart from that, it is not clear how anonymous individual opinions should be discussed during the deliberations of the Court. The implementation of the proposal may require additional human resources to maintain the regime of anonymity of individual opinions in the International Court of Justice. Furthermore, anonymity of individual opinions may destroy the principle of personal responsibility in the system of individual opinions. Consequently, the regime of anonymity of individual opinions may reduce the quality of these opinions which may decrease the quality of the judgements of the Court. Also, it seems justified to assume that even with a system of anonymous individual opinions it might be hard to hide from the public the names of the judges who append their individual opinions to the judgement of the Court. It should be considered that there could be a situation when a judge has no right to express his own opinion publicly but feels that his opinion gravely differs from the majority decision. This situation may lead to a natural desire of a judge to explain himself privately, which cannot be considered a good practice.

In conclusion, it is important to state that the system of publication of individual opinions has already been in existence for a century. During this time the system has been developing in the direction of more openness and transparency. Despite persistent criticism, the system of publication of individual opinions works. The practice of the Court shows that transparency does not lead to systematic negative effects. No objective correlation was established between the publication of dissenting opinions and probable refusal of a state to give consent on which the jurisdiction of the Court is based. That means that the system of publication of individual opinions has not decreased the influence of the Court in international adjudication. The secrecy of deliberations remains one of the fundamental principles of the work of the Court and has not been affected by the publication on individual opinions. The independence of judges could, *inter alia*, be ensured by their status, requirements for election, duration of the term of office, experience, character of a judge as well as by transparency of the processes and the procedures inside the Court. Restrictions on the policy of openness and transparency of the Court does not ensure the independence of a judge, on contrary such restrictions could create an atmosphere of unnecessary secrecy which can potentially hide or manipulate the truth. The main objective of the Court is to establish the truth. The first step to fulfill that purpose is to open the truth about the Court to the general public. Individual opinions do exist in the practice of the International Court of justice and any steps towards prohibition for their publication would serve as a foundation for untruth.

### **3.2 Diminishment of the prestige of the Court**

Amongst the arguments for the abolishment of the system of individual opinions the argument that this system decreases the authority and the prestige of the Court is used more frequently than others. This argument has been examined by the scholars who researched the role of individual opinions in international adjudication as well as by judges of the Court. The problem of possible diminishment of the authority of the Court by individual opinions has been also addressed in the work of Committee of Jurists on the Statute of the Permanent Court of International Justice in 1929.

The criticism of the principle of openness of the Court usually comes from the representatives of the continental system of law. According to the continental school of law, it is presumed that the judgment must be rendered by the Court as a body and should be anonymous. In other words, the decision should be made in the name of the Court and not in the names of

individual judges or a group of individual judges. Consequently, the disclosure of information on the internal processes of the Court and the acknowledgement of the fact that the judgement has a dissent makes the decision not final from above mentioned point of view. The publication of individual opinions, especially dissenting ones, gives reasons to open a discussion about the case outside the Court. These discussions also could lead to the situation where the decision is understood by the general public as not being final.<sup>93</sup> The absence of finality of the decision of the Court is considered to decrease the authority of the Court.

Some scholars express fierce critique of the system of individual opinions. In their point of view this system reduces the authority of the Court, especially when the judgement of the Court is accompanied by the great number of individual opinions:

But the International Court of Justice - depending for its authority in the widest sense more on the persuasiveness of its pronouncements than on the binding nature of its judgements - cannot afford to have 'in-house', 'official' critics. The appending of individual opinions simply is not healthy.<sup>94</sup>

Indeed, there are cases in the practice of the Court in which *each* of the judges of the Court has delivered separate or dissenting opinion or has expressed him- or herself in a form of declaration. For example, the *Legality of the Threat or Use of Nuclear Weapons* case<sup>95</sup>. The Court has exercised its advisory jurisdiction in that case and rendered an advisory opinion with each judge appending his individual opinion to the advisory opinion of the Court. The crucial question of that advisory opinion was whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence of the state. The Court could not reach a conclusion because it was equally divided, and the majority decision made by the President's casting vote. Such situation may lead to the question, whether the Court has the ability to render an authoritative decision in complex cases. Also, this might reopen the discussion about the permission to append individual opinions to advisory opinions of the Court. The aim of the advisory procedure is, *inter alia*, to clarify aspects of international law. It is hard to believe that international law can be clarified when in addition to the advisory opinion of the Court, the applicant in the procedure gets individual opinions from all the members of the Court. As the advisory opinion has no binding force, what would preclude the applicant from using one of the individual opinions instead of the advisory opinion of the Court? How the authority of the advisory opinion could be established if the decision of the Court has been made by the President's casting vote and individual opinions from each member of the Court are available for the parties? It seems that in such cases it is not enough to merely render the decision in the name of the Court to establish the authority of the advisory opinion. The assumption might be made that it would be more positive for the authority of a particular advisory opinion of the Court if that opinion had been rendered anonymously and unanimously. Nevertheless, this situation shows that provisions of international law on the issue have not been settled completely. Judge Oda in his dissenting opinion on the case stated that:

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<sup>93</sup> Hambro, *supra* note 15, p.235.

<sup>94</sup> J. Kammerhofer "Oil's Well That Ends Well: Critical Comments on the Merits Judgement in the Oil Platforms Case" *Liden Journal of International Law*, 17 (2004), p. 716.

<sup>95</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1. C.J. Reports 1996, p. 226.

Conclusions reached by the Court in the present Opinion do not constitute a real response to the request, and I am afraid that this unimpressive result may cause some damage to the Court's credibility.<sup>96</sup>

However, in the view of Judge Oda, the real reason why the Court's decision could have lost its authority was not in the quantity of individual opinions. Judge Oda claimed that the Court should have dismissed the request in the case on account of the general nature of the question in the request. He stated that the case was more of "an academic or intellectual nature"<sup>97</sup> and that there had been no practical necessity in solving that case.<sup>98</sup> Thus, it leads to a conclusion that the quantity of individual opinions in the particular case might be the mere consequence of some other problems that exist in the work of the Court. Also, it can be a signal for the acknowledgment that the problems exist. The elimination of the consequence does not, automatically, eliminate the reason of the problem. Individual opinions perform a function of indication of problems that may exist in the work of the Court.

The situation mentioned above is an exception. However, multiple dissenting opinions which have different approaches to the same case could create an impression that the particular case is so complex by its nature that it could not be definitively resolved. The dissenting or even separate opinions might give the interpretation of the provisions of international law that differs from the interpretation of the same provisions in the majority decision. This, without a doubt, could confuse the general public, or could even be deliberately used by the losing party to decrease the authority of the Court's decision.

On the other hand, supporters of the system of individual opinions state that the concept of unanimity is a fiction.<sup>99</sup> It would be contrary to the aim of the system of justice to keep the truth from the public and support this fiction. "The value of a decision of the Court varied according as it was taken by a unanimous or majority vote."<sup>100</sup> It is obvious, that the decision that has been rendered unanimously is valued more than the decision that has been rendered by the minimal majority. But this estimate of "the value" of a decision of the Court is applicable only to a particular case. The authority of the Court rests not only on "the value" of its particular decisions. The prestige of the Court might be evaluated, *inter alia*, by the ability of the Court to accept that there is no permanent unanimity in its work and also by the willingness to disclose this information to the public.

Furthermore, it would be wrong to regulate the work of any international court in accordance with the practice that was originally developed on the national level. Thus, the principles of the continental school of law could not be used as exclusive principles in the practice of the international courts.

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<sup>96</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1. C.J. Reports 1996, p. 226, Separate opinion of Judge Oda.

<sup>97</sup> *Ibid.*, p.149.

<sup>98</sup> *Ibid.*, p.150.

<sup>99</sup> *Supra* note 7, p. 204.

<sup>100</sup> *Supra* note 13, p. 51.

## **4 IN DEFENCE OF INDIVIDUAL OPINIONS OF THE INTERNATIONAL COURT OF JUSTICE**

### **4.1 The individual opinion as a source for interpretation or elucidation of a judgement of the International Court of Justice**

It seems justified to state that the criticism of the system of individual opinions is mostly based on theoretical assumptions. However, in the *practice* of the International Court of Justice individual opinions “have their uses.”<sup>101</sup> The significant role of individual opinions is to be a source for interpretation or elucidation of a judgement of the Court. This function of individual opinions has been indicated as important by the scholars<sup>102</sup> and is usually not contested by the opponents of the system of individual opinions. Also, judges of the Court have pointed out that:

Separate opinions provide a means for making known the reasons for the votes of members of the majority and this may be useful for the purposes of critical studies by commentators.<sup>103</sup>

However, it is especially valuable when the Court itself in its judgements expresses its opinion in respect to a particular issue. Although indirectly, but the Court had supported the hypothesis that one of the functions of individual opinions is to interpret or elucidate its judgements.

The Court had expressed its point of view on this issue in the *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal* case. In that case the Court was asked to give an advisory opinion on the merits of the decision of the United Nations Administrative Tribunal (the Administrative Tribunal). It is interesting that in its advisory opinion the Court has pointed out that the Administrative Tribunal adopted the practice of the Court in regard to the functioning of the system of individual opinions. It was noted by the Court that the Administrative Tribunal had permitted not only to append individual opinions to the judgement, but also to publish them, which was considered by the Court a “the wise practice.”<sup>104</sup> The Court stated that in order to understand the decision of the Administrative Tribunal it is important to examine individual opinions on that judgement.<sup>105</sup> The Court also stated that:

In order to interpret or elucidate a judgement it is both permissible and advisable to take into account any dissenting or other opinions appended to the judgement.

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<sup>101</sup> Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports /972, p. 46, Separate opinion of Judge de Castro.

<sup>102</sup> S. Rosenne, *The Law and Practice of the International Court*. (Martinus Nijhoff Publishers, Leiden/Boston, 2006.) p. 1530.

<sup>103</sup> Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports /972, p. 46, Separate opinion of Judge de Castro.

<sup>104</sup> *Ibid.*

<sup>105</sup> Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1987, p.31para 49.

Declarations or opinions drafted by members of a tribunal at the time of a decision, and appended thereto, may contribute to the clarification of the decision.<sup>106</sup>

This statement of the Court was given in respect with to a particular case. However, it seems justified to assume the statement was of a general character. By literal interpretation of that statement it might be presumed that the Court addressed its opinion to all judicial organs in international adjudication. This could lead to a conclusion that the statement may be applied to the Court itself. Thus, the Court does not consider individual opinions as an internal critique of its work. Moreover, one can assume that the Court does not separate individual opinions from the judgement. "Individual opinions are best read as indissociable from the majority opinion."<sup>107</sup> The judgement of the Court on the particular case together with individual opinions appended to this judgement form a common system. In that system the function of individual opinions is to provide information on the issues that the Court could not include in the judgement for the different objective reasons. The additional information might be necessary for comprehensive analysis of the judgement of the Court. Furthermore, the statement mentioned above indicates that the Court has a high level of confidence in the authority of its judgements. From that point of view the arguments included in individual opinions cannot diminish the authority of a judgement of the Court. This hypothesis is applicable both to dissenting and to separate opinions. Arguments which are stated in dissenting opinions also elucidates a judgement of the Court. The Court considers these arguments as a tool that might definitively convince the public that the Court's majority did not make a mistake in its decision and the decision therefor has no flaws. The majority renders a particular decision considering all the arguments in individual opinions and, especially, in dissenting opinions. The majority decision could be considered not only in a sense as a legal document, but also as a mental process. From that point of view the majority decision could be regarded as based not only on the arguments which are *included* in a judgment. This decision is also based on the arguments which have been articulated in individual opinions but have been *rejected* by the majority during the deliberations. Thus, the judgement needs individual opinions because the arguments in individual opinions are so to speak part of the decision made by the majority. Without individual opinions it would be impossible to understand the judgement comprehensively.

It worth noting that such an attitude towards individual opinions from the Court in its judgement leads to another conclusion. There is no bipolar system in the work of the Court in which individual opinions are diametrically opposed to the Court's judgement. Individual opinions depend on the judgement of the Court because they cannot exist without the judgement. In reverse the judgement of the Court, *inter alia*, also depends on individual opinions. In a broad sense an individual opinion is a part of a judgement. The word "to attach" in the Article 95 of the Rules of the Court which provides that "Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not"<sup>108</sup> indirectly proves that idea. Therefore, in terms of this hypothesis there is no need for unanimity in the Court to act as a body. The Court as a body does not consider individual opinions as a threat to its authority. In the Court's point of view the existence of

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<sup>106</sup> *Ibid.*

<sup>107</sup> Hernandez, *supra* note 65, p.113.

<sup>108</sup> *Supra* note 23.

individual opinions on the contrary increases the authority of the Court's judgement and, consequently, increases the authority of the Court itself.

According to some scholars, individual opinions of judges *ad hoc* play a special role amongst other individual opinions while performing the function of interpretation or elucidation of a judgement, as these opinions:

may be of a particular help for readers in situating the dispute at hand within the political and historical context of the States involved.<sup>109</sup>

Indeed, judges *ad hoc* usually include in their individual opinion historical and political information on the State, by which they have been appointed. However, as it was pointed out in the previous chapter that the voting behavior of judges *ad hoc* is frequently based on the interests of the State, by which they were chosen. There are cases in which the only dissenting opinion was appended to the judgement by a judge *ad hoc*. Also, the study pointed out that the nature of the argumentation of dissenting opinions of judges *ad hoc* often has a form of a statement rather than an analysis.<sup>110</sup> These individual opinions perform a mere informative function. Nevertheless, these individual opinions are useful in order to understand the position of the State that appointed the judge *ad hoc*.

## **4.2 Do individual opinions in practice of the International Court of Justice contribute to the progressive development of international law?**

The provision of Article 59 of the Statute of the Permanent Court of International Justice and then the provision of Article 59 of the Statute of the International Court of Justice has provided that the judgement of the Court has binding effect only between the parties and with regard to the particular case.<sup>111</sup> However, there is a strong opinion amongst scholars and even individual judges of the Court that: "The development of international law was one of the main reasons for the creation of a permanent court of international justice."<sup>112</sup> And that:

In fact, the practice of referring to its previous decisions has become one of the most conspicuous features of the Judgements and Opinions of the Court.<sup>113</sup>

However, Article 38 of the Statute of the Court explicitly limits the right of the Court to use judicial decisions even as a subsidiary source of interpretation of international law.<sup>114</sup> This approach of the Court is usually characterise as positivistic.<sup>115</sup> The International Court of Justice often refers to its own jurisprudence by citing previous decisions and the decisions of the Permanent Court of International Justice. Nevertheless, the Court uses these decisions merely "to identify or elucidate a rule of law. Not to make such a rule."<sup>116</sup> As Judge

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<sup>109</sup> Hernandez, *supra* note 65, p.113.

<sup>110</sup> Il Ro Suh, "Voting Behavior of National Judges in International Courts" *The American journal of International Law* 63 (1969): p.229.

<sup>111</sup> *Supra* note 22.

<sup>112</sup> H. Lauterpacht, *The development of international law by the Permanent court of international Justice* (London, New York: Longmans, Green and co., 1934), p.8.

<sup>113</sup> *Ibid.* p.9.

<sup>114</sup> *Supra* note 22.

<sup>115</sup> I. Hussain *Dissenting and Separate opinions at the World Court* (Martinus Nijhoff Publishers, 1984)

<sup>116</sup> *Supra* note 22.



Shahabuddeen stated in his separate opinion in the *Aerial Incident of 3 July 1988* case: “The Court is not committed to any doctrine of binding precedent, but it does respect its own jurisprudence.”<sup>117</sup>

The absence of the doctrine of precedent in the work of the Court makes it more difficult to define whether individual opinions of judges of the Court have a direct influence on international law or somehow directly contribute to the development of international law. Nevertheless, the special role of individual opinions of judges of the Court in the international system of law has been noted since the establishment of the Permanent Court of International Justice. A member of the Committee of Jurists on the Statute of the Permanent Court of International Justice in 1929, Sir Cecil had pointed out that:

The views of distinguished judges who happened to be in a minority were as important to the building-up of an international system of law as the views of the majority.<sup>118</sup>

It is undeniable that individual opinions as an instrument of the work of the judges of the International Court of Justice give more possibilities for the judges to express their views on the case than a judgement of the Court. The absence of a legal definition of individual opinions which could determine limits of the scope of individual opinions allows judges to develop their legal thoughts in respect to the matters of the case without any considerations about procedural requirements or consequences. The scope of individual opinions is not restricted by Articles 59 and Article 38 of the Statute of the Court. Other articles of the Statute do not regulate the scope of individual opinions also. Consequently, there are no statutory rules or requirements on the structure or the content of individual opinions. The freedom of expression which is limited only by the conscience of a judge is the obvious reason why individual opinions have become so valuable in determination of the direction of development of international law.

In individual opinions judges often offer new approaches to the application of international law. A good example of the limitless development of legal thought can be found in the individual opinions of Judge Alvarez. In his individual opinions he had developed the theory of “a new international law”. Apart from that, he insisted on the Court’s competence to create law.<sup>119</sup>

However, the Court is limited by Article 59 and Article 38 of its Statute. The direct influence of individual opinions on the application of international law could be established, for example, if the Court referred to individual opinions of judges in its judgements. Indeed, the Court has cited individual opinions in its judgements. For example, in the *Gabčíkovo-Nagymaros Project* case the Court in the Judgement pointed out that one of the parties referred to “the principle of approximate application.”<sup>120</sup> This principle has been articulated

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<sup>117</sup> *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, Order, I.C.J. Rep. 1989 (Dec. 13), p. 132. Separate opinion of Judge Shahabuddeen, p.145 .

<sup>118</sup> *Supra* note 13, p.51.

<sup>119</sup> K. Zobel “Judge Alejandro Alvarez at the International Court of Justice (1946–1955): His Theory of a ‘New International Law’ and Judicial Lawmaking” *Leiden Journal of International Law*, 19 (2006), p. 1022.

<sup>120</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 1. C. J. Reports 1997, p. 7 .

by Judge Sir Hersch Lauterpacht in his separate opinion<sup>121</sup> in the *Admissibility of Hearings of Petitioners by the Committee on South West Africa* case. However, the Court has rarely referred to individual opinions. Such references could be defined more as an exception than as the Court's "practice". Furthermore, the Court tends to follow its own jurisprudence in order not to decrease its authority. Although the conditions for change of the jurisprudence of the Court are not provided by internal documents of the Court one could assume that these conditions have a high threshold. It is not enough for the individual opinion to be well reasoned and persistent to change the jurisprudence of the Court. As Judge Shahabuddeen stated:

And there should be public mischief, or something akin to it, in the sense that the injustice created by maintaining a previous but erroneous holding must decisively outweigh the injustice created by disturbing settled expectations based on the assumption of its continuance; mere marginal superiority of a new ruling should not suffice.<sup>122</sup>

On the other hand, one could assume that there is such a phenomenon as "jurisprudence of individual opinions". This jurisprudence is also respected by the judges of the Court and judges in their individual opinions frequently refer to "jurisprudence of individual opinions".

This hypothesis can be proved by analysis of references in individual opinions to ideas or principles of application of international law which were established in previous individual opinions of other judges. For example, in the *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* case, Judge Robinson in his dissenting opinion cited the separate opinion of Judge Fitzmaurice on another case:

The requirement that there be a "dispute" is designed to ensure that what the Court is being asked to decide is susceptible to its authority and competence, or, as Judge Fitzmaurice in his separate opinion in *Northern Cameroons* said, the dispute must be "capable of engaging the judicial function of the Court."<sup>123</sup>

With this statement Judge Robinson follows the approach of Judge Fitzmaurice in defining the criterion for a "dispute". This approach obviously was not supported by the majority decision in either case. Consequently, the persistent application of the above mentioned criterion could possibly create the consistent "jurisprudence of individual opinions" on this issue.

The joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock<sup>124</sup> on the Judgement of the Court in the *Nuclear Tests* case also illustrates the hypothesis of the existence of "jurisprudence of individual opinions". In this case the

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<sup>121</sup> *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, Advisory Opinion, I.C.J. Rep. 1956 (June 1), p. 20. Separate opinion of Judge Sir Hersch Lauterpacht, p.46.

<sup>122</sup> *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, Order, I.C.J. Rep. 1989 (Dec. 13), p. 132. Separate opinion of Judge Shahabuddeen p.158.

<sup>123</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 255 Dissenting opinion of Judge Robinson.

<sup>124</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253 Joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock.

Court, *inter alia*, decided that although the applicant had requested a declaratory judgement, this was not the true object of a claim.<sup>125</sup> The judges in the joint dissenting opinion opposed the statement of the Court by supporting their point of view with the statement of Judge Hudson in another case but on a related issue:

In international litigation a request for a declaratory judgment is normally sufficient even when the Applicant's ultimate objective is to obtain the termination of certain conduct of the Respondent which it considers to be illegal. As Judge Hudson said in his individual opinion in the *Diversion of Water from the Meuse* case: 'In international jurisprudence, however, sanctions are of a different nature and they play a different rôle, with the result that a declaratory judgment will frequently have the same compulsive force as a mandatory judgment; States are disposed to respect the one not less than the other.' (P.C.I.J., Series AIB, No. 70, p. 79.)<sup>126</sup>

In this joint dissenting opinion, the judges had also referred to several individual opinions in previous different cases of the Court apart from the individual opinion of Judge Hudson mentioned above.<sup>127</sup>

Judge Koroma in his dissenting opinion in the *Armed Activities* case stated that there are different forms of establishing the jurisdiction of the Court and that:

Among these is forum prorogatum, which was explained not long ago by Judge ad hoc Lauterpacht in his separate opinion in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>128</sup>

This statement also proves that when judges in their individual opinions refer to the content of previous individual opinions of other judges, they attach to that particular content some characteristics of the source of interpretation of international law. The views that has been expressed in individual opinions are used as a “*quasi*-precedent” in the system of individual opinions.

However, the *indirect* contribution of individual opinions of judges of the Court to the development of international law is undeniable. The International Court of Justice as a principal judicial body in international adjudication by its jurisprudence naturally contributes to the development of international law, even though it might not create law by its practice:

In the development of international law, the International Court of Justice plays a special role. The fifteen judges represent the world's principal legal systems and main forms of civilization. Each time they hand down a decision they make a definitive and authoritative impact on the development of law.<sup>129</sup>

As it was discussed in the previous subchapter, individual opinions are an important part of the work of the Court, and of the Court's decisions. The discussion on the arguments which are represented in individual opinions is part of the Court's deliberation process and

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<sup>125</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253.

<sup>126</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253 Joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock

<sup>127</sup> *Ibid.* p.315, para10.

<sup>128</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168 dissenting opinion of Judge Koroma p.62, para 25.

<sup>129</sup> M.Lachs “Some reflections on the contribution on of the international court of justice to the development of international law” *Syracuse Journal of International Law and Commerce*, 10, No. 2 (1983), p.245.

eventually these arguments have a certain influence on the majority decision and contribute to that decision. Consequently, as individual opinions influence a judgement of the Court, they contribute to the development of international law.

Accordingly, in conclusion individual opinions in the practice of the International Court of Justice do not *directly* contribute to the development of international law due to the fact that the Court is limited in the applicable sources of international law by the Article 38 and Article 59 of its Statute but have *indirectly* provided a significant contribution to the development of international law and to ensuring the rule of law. On the one hand, individual opinions are part of a judgement since even from a formal point of view these opinions are the appendices of a judgement, on the other hand, individual opinions have no binding force and provide limitless freedom of expression for judges with respect to matters of the case. This dual nature of individual opinions allows them to influence on international law through the contribution to the judgement of the Court, “such opinions are evidence of the life and of the evolution of legal doctrine.”<sup>130</sup>

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<sup>130</sup>*Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports /972, Separate opinion of Judge de Castro, p. 116.

## 5 CONCLUSION

The purpose of the thesis was to identify the *actual* role of the system of the individual opinions in the practice of the International Court of Justice and to propose possible solutions of strengthening the positive effect that this system has on the work of the International Court of Justice.

The research and analyses performed in the thesis allowed to provide answers to the main questions of thesis:

*1. What are the practical and theoretical reasons for the divergent attitude towards the system of the individual opinions amongst the scholars and the judges of the International Court of Justice?*

In the author's opinion there are two main reasons for divergent attitude towards the existence of the system of individual opinions in the International Court of Justice. The first reason is the absence of legal definition of individual opinions in the basic documents of the Court. The basic documents of the Court have certain inconsistencies in respect to the provisions on individual opinions. The Statute of the Court, the Rules of the Court and other documents of the Court do not distinguish separate opinions from dissenting opinions, although, obviously, these are different types of individual opinions with different content. The scope of individual opinions is not defined in the basic documents of the Court either. This leads to a discussion *inside* the Court about possible limitation of the scope of individual opinions by the framework of the judgement of the Court. On the other hand, some judges of the Court have a theory that the freedom of expression of judges should not be restricted in any way. This discussion appears in declarations and individual opinions appended to judgements of the Court, consequently, the content of discussion is available for the general public. The fact that the Court has a disagreement on *procedural* aspects of its work decreases the authority of the Court in the eyes of the general public. The second reason derives from the first reason. The absence of the Court's *official* endorsement of the system of individual opinions by means of the consistent regulation of this system in the basic documents of the Court leads to *theoretical* speculations on the issue of how this system decreases the authority of the Court. Academic community still discusses the possibility of the prohibition of the system of individual opinions. However, the results of the present research showed there are no discussions on how to improve the work of the system of individual opinions *in practice*.

*2. Is there a correlation between the existence of the system of individual opinions and the diminishment of the Court's authority?*

The present research showed that no statistically proven correlation can be established between the existence of the system of individual opinions and the diminishment of the Court's authority. Furthermore, no practical correlation was established between the publication of individual opinions and probable violations of the secrecy of deliberations of the Court. Nevertheless, some negative aspects of publication of individual opinions appended to the advisory opinion of the Court were identified in the thesis. Due to the character of the advisory jurisdiction of the Court it seems to be unreasonable when all or almost all judges of the Court deliver a separate or dissenting opinion to the advisory opinion of the Court. This could be the issue for the further research.

3. *Do individual opinions in practice of the International Court of Justice contribute to the progressive development of international law?*

In author's opinion the distinguished line should be drawn between the *direct* and *indirect* impact of individual opinions on the progressive development of international law. The results of the analyses of the jurisprudence of the Court showed that individual opinions in practice do not and cannot *directly* contribute to the development of international law because the Court is limited in the applicable sources of international law by provisions of its Statute. On the other hand, the author defends the hypothesis that individual opinions form the part of the judgement of the Court. This hypothesis leads to the conclusion that individual opinions *indirectly* provide a significant contribution to the development of international law due to the fact that arguments of individual opinions are discussed during the Court's deliberations and influence on the decision of the majority. Moreover, the author proposes that a phenomenon of consistent "jurisprudence of individual opinions" exists in the work of the Court. This jurisprudence is separate from the jurisprudence of the Court. This issue also could form the basis for the future research.

4. *What are the possible proposals on how to regulate the system of individual opinions in the basic documents of the International Court of Justice?*

The findings of the thesis suggest that for the *progressive* development of international law it is important to develop proper regulation for the system of individual opinions. The definition of individual opinions and provisions on the types of individual opinions should be included in the Rules of the Court. The question of the scope of individual opinions should be definitively resolved in order to prevent further speculations on how the content of individual opinions could decrease the authority of the Court.

The results of the present research showed that the system of individual opinions in the International Court of Justice is understudied by scholars. There are only two main directions of the discussion about individual opinions in academic community: whether it is reasonable to prohibit the system of individual opinions (or some part of this system) or whether it is reasonable to keep the system. However, the system of individual opinions needs for deeper substantial research with the aims for possible directions of development of this system in order to insure the *progressive* development of international law.

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